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90-1024

No. 90-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN L. VIDAKOVICH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for Petitioner

December 21, 1990

QUESTIONS PRESENTED

The defendant entered into a plea agreement with the U. S. Attorney's Office whereby he would plead guilty to three felony counts (18 U.S.C. §656-Misapplication of Bank Funds, 18 U.S.C. §1005-False Entry in Bank Records, and 18 U.S.C. §1503-Obstruction of Justice) if his wife, children and former law partner were spared from prosecution. Subsequent to his guilty pleas but before sentencing, defendant moved to withdraw his pleas on the basis that the pleas were coerced and not voluntarily entered which motion was denied and the defendant sentenced.

The questions presented are:

1. Is a plea bargain inherently unconstitutional as violative of a defendant's Fifth and Sixth Constitutional Amendments rights where

the primary consideration to the defendant is an agreement not to prosecute his wife and children for related crimes?

2. Was there an abuse of discretion by the District Court Judge who failed to allow defendant prior to sentencing to withdraw his guilty pleas pursuant to said plea agreement where the defendant presented fair and just reasons for the withdrawal of his pleas and where no probable cause had ever been shown by the U.S. Attorney's Office upon which the prosecution of defendant's family members would be based?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff, United States of America, and the defendant, John L. Vidakovich.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

The defendant, John L. Vidakovich, respectfully requests that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered on August 24, 1990.

OPINIONS BELOW

The August 24, 1990, opinion of the Tenth Circuit Court of Appeals, 911 F.2d 435 (C.A.10, 1990), is reprinted in the Appendix hereto, at p. 1a. The findings, judgment and sentence of the U.S. District Court for the District of Wyoming is reprinted in the Appendix hereto at p. 22a.

JURISDICTION

The decision of the Tenth Circuit Court of Appeals was rendered on August 24, 1990, affirming the judgment and sentence of the U.S. District Court for the District of

Wyoming. By Order of this Court (A-390) dated November 23, 1990, defendant was allowed until and including December 24, 1990, to file a petition for Writ of Certiorari. The jurisdiction of this Court to review the judgment of the Tenth Circuit Court of Appeals is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

A. FIFTH AMENDMENT TO U.S. CONSTITUTION

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor

shall private property be taken for public use, without just compensation.

B. SIXTH AMENDMENT TO U.S. CONSTITUTION

[AMENDMENT VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On May 18, 1989, the defendant John L. Vidakovich entered guilty pleas to violating 18 U.S.C. §656 (Misapplication of Bank Funds), §1005 (False Entry in Bank Records), and §1503 (Obstruction of Justice), pursuant to a plea

agreement between defendant and the U.S. Attorney's Office. On October 24, 1989, the defendant moved to withdraw his guilty pleas and filed affidavits in support thereof contending his pleas had been coerced in his effort to protect his family members from prosecution. That Motion was set for hearing on November 15, 1989, together with sentencing where the Court denied defendant's Motion and proceeded directly to sentence the defendant to four years on each count, Appendix, p. 24a.

An appeal was then taken to the Tenth Circuit United States Court of Appeals where the District Court judgment was affirmed, Appendix p. 1a-22a, on the basis that the Lower Court Judge had not abused his discretion in refusing to allow the pleas to be withdrawn. The constitutional issues inherent in the plea bargain were not directly addressed by the Court of appeals.

Jurisdiction of the District Court was pursuant to 18 U.S.C. §3231.

STATEMENT OF FACTS

The Yellowstone State Bank of Lander, Wyoming (Bank), was closed by Federal and State authorities on November 1, 1985. Shortly thereafter, a Grand Jury investigation was commenced which went on for several years. Defendant John Vidakovich was a founder of the Bank, the Chairman of its Board of Directors, and the primary stockholder in the Bank.

Vidakovich knew that he was a subject of the Grand Jury investigation and he elected to testify before the Grand Jury to see if he could answer questions they might have because the investigation had gone on for several years and the resultant speculation and pressure was very harmful to defendant and his family. His appearance was scheduled before the Grand Jury on May 17, 1989, and

he testified all day long. At the conclusion of his testimony, counsel for the defendant approached the U.S. Attorney's Office to learn if they wanted anything else and where they intended to proceed with the investigation. Vidakovich then learned that the U.S. Attorney's Office intended to present a multi-count indictment to the Grand Jury the next day naming not only the defendant, but also his wife, two of his children and his former law partner.

Vidakovich next inquired as to whether there were any alternatives and he was advised by his counsel, who had conferred further with the U.S. Attorney's Office, that they would accept pleas to three felony counts from Vidakovich and not prosecute his family members or former law partner if Vidakovich would swear that he was guilty and assume responsibility for anything his family members might have done. Further, Vidako-

vich was given until early morning to make his decision or the indictments were to be presented.

Faced with that decision, Vidakovich panicked and told his counsel there was no choice. He advised his wife couldn't handle the ordeal of a trial, his daughter had two chilren and was pregnant with a third, and his son was studying to take the bar exam. He described his state of mind as "stunned, panicked, traumatized."

Vidakovich was further advised by his counsel that the U.S. Attorney's Office would not agree to any plea bargain except upon affirmation from Vidakovich that any plea entered was because he was guilty and not because he was protecting his family. Vidakovich, himself an attorney, acknowledged he knew this and he left Cheyenne, Wyoming, for his home in Denver, Colorado. The follow-

ing morning, Vidakovich returned to Cheyenne and entered his pleas. Vidakovich acknowledged he lied to the Court as to the voluntariness of his pleas and that he had committed the offenses involved. When asked "why?" he responded, "Because I believed if I didn't plead guilty to the three felony counts that you would indict my family and my friends," which he felt was unfounded. The U.S. Attorney's Office at the time the pleas were entered, was well aware that Vidakovich had spent the entire day before testifying before the Grand Jury that he had done nothing wrong in connection with his activities with the Bank. Vidakovich told the Grand Jury it made no sense to defraud a Bank that was the source of his livelihood and of which he owned seventy percent (70%).

At the hearing before the District Court Judge, Vidakovich explained that he had a

defense to every charge contemplated by the U.S. Attorney's Office and that his family was, likewise, innocent of any wrongdoing. He testified his sole reason for pleading guilty was because he felt he had to do that for the health and welfare of his family. Vidakovich said he felt threatened because of threats made toward him in meetings with the U.S. Attorney's Office prior to his Grand Jury appearance and because of third party statements to Vidakovich that the U.S. Attorney's Office intended to put Vidakovich in jail if they had to use his friends and family to do it.

Vidakovich testified that the reason he moved to withdraw his pleas was because the U.S. Attorney's Office violated their plea agreement with him (by actively seeking restitution when they'd agreed to allow that matter to be resolved through FDIC lawsuits

then pending against Vidakovich, et al.) and because of the build-up within him knowing he'd pled guilty to offenses he didn't commit. Vidakovich said that on May 18, 1989, he did whatever he had to do in order to avoid the indictment of his family, but that as time went by after his pleas were entered, he knew he could not let that injustice stand. When Vidakovich filed his Motion to withdraw his pleas, there was nothing pending in his case. The Motion hearing and sentencing were set at a later date.

The District Court Judge denied defendant's Motion finding that Vidakovich was trying to stall off sentencing and that it came at a time that Vidakovich knew the U.S. Attorney had probably shut down this investigation. The Judge conducting the hearing also concluded that the arraigning judge had carefully and cautiously accepted the plea.

REASONS FOR GRANTING THE WRIT

This Court has not in the past reached the direct question of whether a guilty plea can be considered as voluntarily given where the primary consideration to the defendant is the opportunity to spare close family members of prosecution for related crimes. This case presents that issue directly and involves consideration of whether basic Fifth and Sixth Amendment Rights are violated by such a plea bargain and, if not, the opportunity for this Court to settle the conflict that appears to exist between the Circuits as to the criteria by which voluntariness of such a plea can be judged.

I. The plea bargain offered defendant was inherently unconstitutional in that it deprived defendant of basic Fifth and Sixth Amendment Rights.

The plea bargain offered to the defendant in this case was, in material part, that if defendant would plead guilty to three felony counts involving the failed Yellowstone State Bank, a fifteen-count indictment naming defendant, his wife, his daughter, his son and his former law partner would not be presented to the Grand Jury. After testifying before the Grand Jury all day May 17, 1989, that he was innocent of any wrongdoing, defendant was given until the next morning to decide whether to accept the proposed plea agreement.

Faced with the prospect of saving his family from prosecution, which defendant

believed would be overwhelming to at least his wife and daughter, defendant agreed to plead guilty. He would subsequently testify he knew he had to lie to the arraigning judge to convince him to accept the pleas by agreeing there was a factual basis for the pleas. Defendant, an attorney himself, stated the coercion he felt from the proposed plea agreement was so intense he would have done anything to avoid the prosecution of his family.

It seems, as a matter of judicial notice, this Court could conclude that under these circumstances any reasonable and caring parent and husband would sacrifice whatever was necessary to avoid the prosecution of his family and most specifically his Fifth Amendment Rights not to be compelled to be a witness against himself or to be deprived of life, liberty and property without due process. Where is the due process in the

plea bargain that says plead guilty or we prosecute your wife, your daughter who is pregnant with her third child and your son who is getting ready to take the bar exam.

The defendant was thus also deprived of his Sixth Amendment Rights to a jury trial and the effective assistance of his counsel. The defendant's psychiatrist testified by affidavit that the defendant accepted the plea bargain not as the result of considered, rational judgment, but solely as the result of the duress, stress and coercion he felt and the necessity to protect his family.

In Bordenkircher v. Hayes, 434 U.S. 357 n. 8 (1978), this Court left open consideration of how adverse or lenient treatment for some person other than the accused might affect the plea bargaining process, and cf. Brady v. United States, 397 U.S. 742, 758. This case involves the ability of a defendant to make a voluntary choice regarding the

entry of a guilty plea where the only "right" thing for him to do was to waive his Constitutional rights and spare his family of the prosecutorial process irrespective of his own belief in his and their innocence of any wrongdoing. While no statistical information is available, it is submitted that plea bargains are frequently structured around lenient treatment for others. When "the others" become immediate family members, voluntariness of any guilty plea cannot be assured.

The Court should accept certiorari to correct the lower court's failure to address the constitutional issues inherent in a plea bargain and resulting guilty plea of the type here involved.

II. **Absent at least the showing of probable cause for the prosecution of the third party beneficiaries to the defendant's plea bargain, it was an abuse of discretion by the District Court Judge not to permit defendant to withdraw his guilty pleas.**

The opinion and judgment by the lower court and the District Court Judge in this case are in direct conflict with the Eleventh Circuit as reflected by Martin v. Kemp, 760 F.2d 1244, 1247 (C.A.11, 1985) wherein it was held that once the defendant challenged the voluntariness of his guilty plea where a third party was the beneficiary of such plea, it becomes incumbent upon the prosecution to establish a "high standard of good faith" based upon probable cause to believe that the third party has committed a crime. No showing of probable cause was ever made by

the government in ths case with respect to the prosecution of defendant's family members. It was not required at the arraignment and the District Court Judge at the Motion hearing on defendant's request to withdraw his guilty pleas closed the hearing after defendant had testified neither he nor his family members were guilty of any of the crimes charged. Whether the government intended to introduce evidence of such probable cause to support their good faith belief of their legal ability to prosecute defendant's family members was never reached and in response to the judge's inquiry as to whether any additional findings were desired, the government requested none, Appendix p. 31a.

Again, this issue was not discussed by the lower court in its ruling affirming the District Court even though such a request was specifically made by defendant in his argument to the Court and in his brief.

Inasmuch as there is a conflict between at least the Tenth and Eleventh Circuits on this issue, clarification from this Court would greatly assist not only defendants in the predicament faced by the defendant in this case, but would also assist lower courts and the government in protecting individuals' Constitutional Rights in the plea bargaining process.

CONCLUSIONS

For these reasons, this petition for certiorari should be granted.

Respectfully Submitted,

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December 21, 1990

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 89-8096

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JOHN L. VIDAKOVICH,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
For the District of Wyoming
(D.C. No. CR 89-0037)

David B. Hooper of Hooper Law Associates, P.C., Riverton, Wyoming, for Defendant-Appellant.

Francis Leland Pico, Assistant United States Attorney (Richard A. Stacy, United States Attorney, with him on the brief), District of Wyoming, Cheyenne, Wyoming, for Plaintiff-Appellee.

Before McKAY, SETH, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Pursuant to a plea bargain with the government, John L. Vidakovich pled guilty on May 18, 1989, to a three-count information filed in the United States District Court for the District of Wyoming charging him with bank fraud. Specifically, count one charged Vidakovich, the owner of the Yellowstone State Bank, with the misapplication of monies belonging to the Yellowstone State Bank, which was insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. §656. In count two, he was charged with the making of false entries in the books and records of the Yellowstone State Bank for the purpose of injuring and defrauding the bank, the Federal Deposit Insurance Corporation, and examiners of the Federal Reserve Bank of Kansas City, Missouri, in violation of 18 U.S.C. §1005. In count three Vidakovich was charged with the

obstruction of justice by knowingly, and with an improper motive, failing to produce documents in his possession for inspection and use by a Grand Jury, in violation of 18 U.S.C. §1503.

Some five months after pleading guilty to the charges described above, Vidakovich filed a motion on October 24, 1989, to withdraw his plea of guilty to each of the three counts of the information. As reason therefor, Vidakovich asserted: (1) that his guilty pleas were involuntary and coerced; (2) that he had a valid defense to each of the charges; and (3) that the government had breached the plea bargain when it asked the district court to enter a restitution order as a part of its sentence.

Acting pursuant to a local rule of court, the case was reassigned to a United States District Court Judge for the

District of New Mexico who, after hearing, denied the motion to withdraw the guilty pleas previously made by Vidakovich. The same judge then sentenced Vidakovich to four years imprisonment on each of the three counts, to be served concurrently. As part of his sentence, the district judge further ordered that Vidakovich make restitution to the United States Department of Justice in the amount of $1.25 million.[1] Finally, the district judge ordered a special assessment in the amount of $50 for each count, pursuant to U.S.C. §3013. Vidakovich appeals the district court's order denying his motion to withdraw his pleas of guilty. We affirm.

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1 We are advised that Vidakovich filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35 and that the district court thereafer vacated its restitution order.

A few background facts will place the matter in focus. Vidakovich, a lawyer, was the owner of the Yellowstone State Bank in Lander, Wyoming. His wife, as well as two children, also had an interest in the bank. The bank had been closed by federal and state authorities on November 1, 1985, and thereafter had been the subject of a Grand Jury investigation for several years. On May 17, 1989, Vidakovich appeared under subpoena before the Grand Jury. Vidakovich, who had an attorney, testified most of that day before the Grand Jury. Negotiations between the government and Vidakovich and his attorney took place during the late afternoon and evening on May 17, 1989, and culminated in a plea bargain whereby Vidakovich appeared in district court the next morning, May 18, 1989, and pled guilty to the three-count information referred to above.

As indicated, after the Grand Jury adjourned on May 17, 1989, Vidakovich's counsel contacted government counsel to discuss the situation. Although there is some dispute as to the sequence of events, we will assume that the government indicated that it was preparing a multi-count indictment against Vidakovich and members of his family for bank fraud. Vidakovich's counsel indicated that a "deal" might be possible. After conferring with Vidakovich, his counsel indicated that he might be willing to plead guilty to one count. Government counsel indicated that Vidakovich would have to plead guilty to three counts.

At this juncture, it became apparant that any plea bargain must be conditioned on the government's promise not to pursue any additional claims against Vidakovich, any members of Vidakovich's family, or his

former law partner. Counsel was advised that it would be unacceptable to the court, and to the government, if Vidakovich were to plead guilty simply to prevent his wife and children from being prosecuted. Vidakovich's attorney explained that Vidakovich would be pleading guilty only because he was in fact guilty, adding that any actions of his wife and children relating to their interest in the bank were at Vidakovich's direction. In any event, and disregarding who said what and when at these discussions, as an outgrowth of that meeting it was agreed that Vidakovich would plead guilty the next morning to a three-count information, and that the government would not seek a Grand Jury indictment against Vidakovich, his family, or his former law partner.

As indicated, on May 18, 1989, Vidakovich pled guilty to all counts in a three-count information and sentencing was delayed for a pre-sentencing investigation and report. The transcript of the hearing when Vidakovich pled guilty indicates that both counsel agreed that they, by their plea bargain, could not interfere with the discretion vested, by statute, in the district court in its imposition of sentence. The United States Attorney agreed that he would not request imposition of a fine, which would leave the matter to the district court. As concerns a restitution order, it is true, as counsel points out, that the district court inquired of the United States Attorney as to whether there are "going to be issues with regard to restitution...." The United States Attorney replied, "None that I'm

aware of at this time...." The district court was then advised that the Federal Deposit Insurance Corporation had already filed civil suits against Vidakovich in state court "attempting to recoup through civil action." In response to this limited colloquy, the district court responded as follows:

> It is my understanding with regard to the disposition in this case that the Court is not bound to any agreement and will independently make determination as to what is an appropriate disposition and sentence in this matter."

To the foregoing statement by the court, Vidakovich personally replied, "I understand that."

At the outset, we reject the suggestion that by filing a motion to require restitution to the Federal Deposit Insurance Corporation the government breached the plea bargain with Vidakovich.

This line of argument is without merit for several reasons. The record before us contains a so-called "sworn statement" of Vidakovich, made during the plea bargaining process, wherein the government, in return for Vidakovich's pleading guilty to a three-count information, "promised" Vidakovich four things: (1) the government would not file any additional charges against Vidakovich based on his operation of Yellowstone State Bank; (2) the government would not file any charges against any member of Vidakovich's family based on their activities at the bank; (3) the government would recommend to the district court that Vidakovich be placed on a "signature bond" pending sentencing; and (4) the government would not file any criminal charges against any other officer or director of the bank, or John Pappas, Vidakovich's former law partner. After itemizing these promises, Vidakovich

indicated quite clearly that these were the only promises made him by the government.

At the hearing on the following day, May 18, 1989, when Vidakovich pled guilty to the three-count information, the district court was advised of the terms of the plea bargain. There was colloquy between the court and counsel regarding a "fine" and "restitution." It was at that time that the United States Attorney agreed that as a part of the plea bargain he would not request a fine which, of course, would have left the matter to the discretion of the judge.[2]

The colloquy between the court and counsel regarding restitution has been set

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2 We agree, of course, with counsel that a criminal "fine" and a "restitution" order to make payment to the victim are not one and the same.

forth above. It is true that in response to an inquiry by the court, the United States Attorney stated that "at this time" there apparently would be no issue regarding restituion since the Federal Deposit Insurance Corporation had already brought civil action against Vidakovich to recover monies misapplied by Vidakovich. Any possible misunderstanding by Vidakovich of the response made by the United States Attorney was immediately clarified by the district judge when he stated, in direct response to the restitution colloquy between the court and government counsel, that in imposing a sentence he was "not bound by any agreement" and that he would make an independent "determination as to what is an appropriate disposition and sentence in this matter," to which statement Vidakovich replied, "I understand that."

Additionally, when the United States Attorney later filed a motion to require restitution, Vidakovich filed a "traverse," seeking to have the motion denied, not on the basis of the plea bargain itself, but on the basis of the court colloquy which occurred when Vidakovich pled guilty to the three-count information. Finally, even though the district court initially imposed a sentence which included a restitution order, we are advised that the order was later vacated on motion. So, thereafter, Vidakovich was under no restitution order. For all those reasons, the restitution "problem" did not require the district court to grant Vidakovich's motion to withdraw his guilty pleas.

The central issue in this case is whether Vidakovich's pleas of guilty were knowingly and voluntarily made, or were the result of coercion. The judge who conducted the hearing on the motion to

withdraw had before him numerous affidavits submitted by both parties, and Vidakovich testified at length. The district court then held that the pleas were entered knowingly and voluntarily. We are not inclined to disturb that holding.

As indicated, Vidakovich testified at length at the hearing on his motion to withdraw his pleas of guilty which by then had been entered some five months previously. The gist of his testimony was that he had "lied" when he pled guilty to the three-count information, that in fact he was not guilty of any of the offenses charged, had complete defenses to all charges, and that he only pled guilty to protect members of his family and his former law partner.

As stated, in addition to the testimony of Vidakovich, the district court had before it numerous affidavits from both parties, and a transcript of the

proceedings when Vidakovich entered his pleas of guilty. After considering all of this evidentiary matter, the district court concluded, in effect, that Vidakovich had told the truth at the hearing when he pled guilty to the three-count information, and was lying when he testified at the hearing on his motion to withdraw his guilty pleas. The judge who denied the motion to withdraw noted that the transcript of the hearing when Vidakovich pled guilty indicated that the judge who accepted the pleas had acted most "carefully and cautiously," a fact which Vidakovich concedes. Also, the district court observed that Vidakovich was trying to "manipulate" the judicial process, and that with the lapse of time the government was "prejudiced," i.e., the Grand Jury, after Vidakovich's pleas of guilty, had "shut down" its investigation and with the ensuing lapse of time that statute of limitations had run on at least

certain of the possible charges against Vidakovich. We are not inclined to disturb the district court's findings. Certainly the district court was not required to accept Vidakovich's self-serving testimony given at the hearing on his motion to withdraw his pleas of guilty.

In support of our disposition of this appeal, see, Mosier v. Murphy, 790 F.2d 62 (10th Cir. 1986), cert. denied, 479 U.S. 988 (1986); United States v. Cross, 735 F.2d 1213 (10th Cir. 1984); United States v. Hancock, 607 F.2d 337 (10th Cir. 1979); and, Barker v. United States, 579 F.2d 1219 (10th Cir. 1978).

Fed. R. Crim. P. 32(d) reads as follows:

> If a motion for withdrawal of a plea of guilty or nolo contendre is made before sentence is imposed, the court may permit withdrawal of the plea upon a

> showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255.

In Cross, supra, we stated that the withdrawal of a guilty plea before sentencing is not a matter of right, but a matter of discretion, and that the test for review of an order denying a motion to withdraw a plea of guilty is whether such action, on the basis of the record, constitutes an abuse of discretion. "Unless it appears that the court acted unjustly or unfairly, there is no abuse of discretion," citing Johnson v. United States, 485 F.2d 240, 274 (10th Cir. 1973).

In Hancock, supra, we also stated that a defendant does not have any absolute right to withdraw his plea of guilty even though the motion is made before sentencing.

We did note in Hancock, supra, that where a motion to withdraw is made before sentencing, the motion should be "considered carefully and with liberality." We did reverse in Hancock, supra, but in that case the district court held no hearing on the motion to withdraw. In the instant case, the district court did hold a hearing where, inter alia, Vidakovich testified at great length.

In Mosier, supra, a defendant in state court pled guilty to murder pursuant to a plea bargain. Later, he brought an action pursuant to 28 U.S.C. §2254 claiming, inter alis, that he had only pled guilty because the prosecutor had agreed not to press charges against his wife and mother-in-law. The district court denied relief, and on appeal, we affirmed. In doing so, we spoke as follows:

> We cannot conclude that Mr. Mosier's Sixth Amendment rights were violated because much of the benefit of his plea bargain was bestowed upon third persons. We recognize that threats to prosecute or promises of leniency to third persons to induce guilty pleas can pose a danger of coercion. Aside from requiring special care to insure that the plea was in fact entered voluntarily and was not the product of coercion, we must respect the defendant's choice and "[i]f [an accused] elects to sacrifice himself for such motives, that is his choice..." (citations omitted).

Id. at 66.

In Barker, supra, we upheld a district court's denial of a defendant's motion to withdraw his plea of guilty, agreeing with the district court that the defendant was by his motion to withdraw "attempting to manipulate the criminal justice system."

Finally, we note that although Vidakovich pled guilty to the three-count information on May 18, 1989, he did not

file any motion to withdraw his plea of guilty until October 24, 1989. The government filed its motion to require restitution on September 1, 1989, and Vidakovich filed a traverse to that motion on September 19, 1989, complaining that the government's motion violated the plea bargain. The motion to withdraw the pleas of guilty was filed some seven weeks after the government's motion to require restitution.

The five-month delay between the entry of Vidakovich's pleas of guilty and his motion to withdraw suggests "manipulation." Counsel argued that Vidakovich was in fact "agonizing" over his decision to plead guilty for that entire period of time. Be that as it may, in United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975), cert. denied, 421 U.S. 1013 (1975), when there was an eight-month lag between a plea of

guilty and a motion to withdraw the plea of guilty, the Court of Appeals for the District of Columbia spoke as follows:

> Even where the plea was properly entered, however, the standard for judging the movant's reasons for delay remains low where the motion comes only a day or so after the plea was entered.... A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force. The movant's reasons must meet exceptionally high standards where the delay between the plea and the withdrawal motion has substantially prejudiced the Government's ability to prosecute the case. The most common form of prejudice is the difficulty the Government would encounter in reassembling far-flung witnesses in a complex case, but prejudice also occurs where a defendant's guilty plea removed him from an ongoing trial of co-defendants who were then

> found guilty. That withdrawal would substantially inconvenience the court is also a proper factor for consideration (citations omitted).

Id. at 222.

Judgment affirmed.

JUDGMENT AND

TRANSCRIPT OF DENIAL OF DEFENDANT'S

MOTION TO WITHDRAW GUILTY PLEAS

United States of America

United States District Court for

DEFENDANT: JOHN L. VIDAKOVICH

THE DISTRICT OF WYOMING

DOCKET NO. CR89-0017

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on the date: November 15, 1989

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired counsel be appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL David Hooper (Name of Counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea [ ] NOLO CONTENDERE [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding: [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of misapplication of funds, in violation of Title 18, United States Code, Section 656; False entry in bank records, in violation of Title 18, United States Code, Section 1005; Obstruction of justice, in violation of Title 18, United States Code, Section 1503.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years as to Counts I, II, III with said sentence to run concurrently with and not consecutively to each other; it is

FURTHER ORDERED that the defendant make restitution to the U.S. Department of Justice in the amount of $1.25 million with said restitution to be paid immediately; it is

FURTHER ORDERED that a special assessment is imposed pursuant to Title 18, United States Code, Section 3013 in the amount of $50.00 as to each count; it is

SPECIAL CONDITIONS OF PROBATION

FURTHER ORDERED that the defendant is continued on the conditions of his present bond and execution of the sentence imposed above is stayed until 12:00 o'clock noon, December 15, 1989, at which time defendant shall voluntarily report and surrender himself to the federal institution designated by the Attorney General, at which time bond shall be discharged and sureties released.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends: Federal Prison Camp, Lompoc, California, or Yankton, South Dakota, or Leavenworth, Kansas.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED A TRUE COPY
William [illegible]
Clerk
By [signature]
Deputy Clerk

[signature]

20 Nov. 89

MR. PICO: Thank you, Your Honor.

THE COURT: This matter is before me on the defendant's motion to withdraw his plea. I have reviewed the statement that he gave to the United States Attorney's Office on the morning of the 18th or approximately noon on the 18th. I have reviewed thoroughly the transcript of the plea before Judge Johnson.

Judge Johnson in taking the plea was absolutely meticulous in asking all of the right questions to make sure that the plea was freely and voluntarily given. He at that time had the opportunity to observe the defendant, his demeanor. Had there been anything out of the ordinary, I'm sure he would have called it, put it on the record. And the testimony when he pled is just replete with statements to the effect that he knew exactly what you were doing, nothing whatsoever about coercion, nothing like that at all.

You then wait from May 18th to October 24th before you file your motion to withdraw your plea. I assume by that time, by the 24th of October you understood that sentencing was not too far down the line. I interpret that as simply a motive on your part to stall these proceedings so that you never had to face today.

You testified to this traumatic experience, which I would certainly agree pleading guilty to these three counts would certainly be a traumatic experience for any individual in your position, but nevertheless, you had more than sufficient time after that to withdraw your plea. You didn't do so. That indicates to me that you, particularly as a lawyer knew that the U.S. Attorney had probably shut down this investigation, and if you could withdraw your plea at a late time, you could cause them to regenerate all of this that they

had done before, and that they might lose a little enthusiasm for it, not a tactic that is unknown in the federal court system for defendants to attempt to withdraw their plea on that basis.

The law is quite clear in the Tenth Circuit, starting with the case of Mosier versus Murphy, a 1986 decision found at 790 F.2d, page 62, came before the Court out of Oklahoma habeas corpus from the state court. Page 66 the Court states -- the defendant's attorney is talking to the defendant and he said, "After pointing out these drawbacks to the plea, the attorney also told defendant Mosier that if he didn't accept the plea and the jury returned a guilty verdict, the prosecution would likely file charges against Wanda Cable and proceed with the already-filed charges against Denise Mosier. Such advice

clearly informed Mr. Mosier that the central benefit to be derived from the guilty plea would be the protection of his wife and mother-in-law from prosecution. We think such advice fairly presented the ramifications of the contemplated guilty plea and is well within the range of the required competence.

"We cannot conclude that Mr. Mosier's Sixth Amendment rights were violated because much of the benefit of his plea bargain was bestowed upon third persons. We recognize threats to prosecute or promises of leniency to third persons to induce guilty pleas can pose a danger of coercion. Aside from requiring special care to insure that the plea was in fact entered voluntarily and was not the product of coercion, we must respect the defendant's choice, and if an accused elects to sacrifice himself for such motives, that is his choice."

In Barker versus United States out of 579 Fed 2d 1219, a 1978 case by Judge Barrett, talking about withdrawing a plea. He says, "The test should be applied when a motion to withdraw a guilty plea is made before sentencing is that of fairness and justice.

"Even though the general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality, still the decision thereon is within the sound discretion of the trial court.

"Thus, unless it is shown the trial court acted unjustly or unfairly in denying motion to withdraw guilty plea before sentencing, there is no abuse of discretion."

The testimony that you gave to the United States Attorney, the recorded statements that you gave before you entered your plea indicates and proves to me positively

that what they were doing was protecting themselves on the plea so that there would be no doubt that it was freely and voluntarily given.

As I said before, Judge Johnson in taking the plea did a much better job than I've ever seen a federal judge do on asking all of the questions to convince himself that the plea was freely and voluntarily given. To allow you to now withdraw your plea at this late date after the United States Attorney has shut down their investigation would simply be a mockery of justice.

You could play this game on and on if you were allowed to withdraw your plea. You'd go to the trial and then decide to plea at that time and then come back to the next judge and say that you were traumatized because you were going to go to trial and your relatives are going to go to trial or whatever else.

So the motion to withdraw the plea will be denied. Does either side need any additional findings from me on that particular motion?

MR. HOOPER: No, Your Honor.

MR. PICO: Not on behalf of the United States, Your Honor.

THE COURT: All right. Then we'll proceed with sentencing. Have you received a copy of the presentence